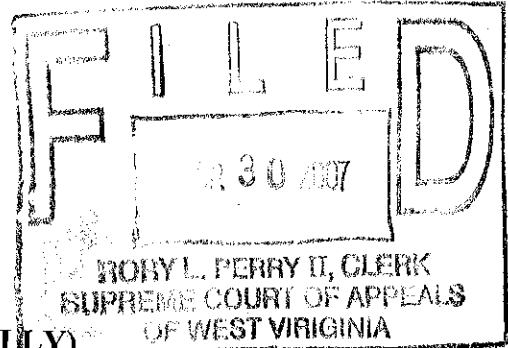


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33301



SANDRA LYNN FOSTER (now LILLY)
Appellant/Plaintiff/Respondent Below

v.

JAMES TYRONE FOSTER,
Appellee/Defendant/Petitioner Below

Robert A. Burnside, Jr.
Circuit Court of Raleigh County
Civil Action No. 81-D-380

BRIEF OF APPELLEE

DARL W. POLING
POLING LAW OFFICES
P. O. BOX 762
BECKLEY, WEST VIRGINIA 25802
304-255-0191
Counsel for Appellee

Comes now the Appellee, James T. Foster by counsel and files this brief in response to the Appellant's brief previously filed with the Court.

I. OMISSIONS OR INACCURACIES WITH APPELLANT'S STATEMENT OF FACTS

While the Appellant has set forth the basic time frame and facts pertaining to the protracted litigation which has occurred in this case, several items need to be clarified. First, it is unclear from the Appellant's Statement of Facts that more than two (2) separate audits were conducted during the history of these proceedings. The first "audits" were conducted prior to May 28, 1998, to try and determine the status of the Appellant's claim for child support arrearages. These audits were conducted by the Bureau for Child Support Enforcement (hereafter BCSE) as part of their usual procedures to establish the amount of any arrearage that may exist in child support enforcement cases. The case file in this matter contains numerous exhibits and documents identified as "audits" which were presented in the BCSE's attempts to establish an arrearage in this case.

There also was an audit conducted during these proceedings in response to a MEMO ruling issued by Family Law Master Staton (now Judge Staton) on May 28, 1998. This audit was conducted to determine the amount of arrearage, if any, that existed after application of the statute of limitations based upon Judge Staton's rulings on the Appellant's right to collect the claimed arrearage. A copy of said MEMO is attached hereto as Exhibit "A".

The final audit conducted in this matter, was the audit conducted by the BSCE in response to Judge Staton's order of April 7, 2000. This audit was ordered to determine how the

continued withholding of child support from the Appellee's income during the proceedings, impacted on the arrearage. This audit took into consideration the application of the statute of limitations, disputed payments, and all other payment matters. This audit indicated that the Appellee had made an overpayment in his child support obligation.

After the audit of April 7, 2000, was conducted, no objections to the audit were filed on behalf of the Respondent. It has always been the Appellee's position, that pursuant to the prior procedures of the Court; if no objections to an audit were filed, it was the intent of the Court that a judgment be entered in the amount of the undisputed audit. See May 28, 1998, MEMO of Family Law Master Staton. However, for some reason, whether it be the realignment¹ of the Family Court case distribution or otherwise, no order was entered in this matter. Therefore, the Petitioner proceeded to clarify this oversight by filing the current Petition.

Additionally, the Appellant has omitted or elected not to present a crucial set of facts. While the Appellant did refer to the Circuit Court's order of July 27, 2005, (see page 8 of Appellant's Brief), the Appellant did not provide the complete background to this ruling. The Order of July 27, 2005, came as a result of the Appellee's appeal of the Family Court's adoption of the Appellant's position that the statute of limitations was a bar to the Appellee's right to collect his overpayment.

In response to the Appellee's appeal, the Appellant filed a response and supporting memorandum opposing the Appellee's appeal. The response filed by the Appellant presented the same arguments as are being presented at this time. After considering the arguments presented in

¹After Judge Staton had handled this matter through the audit of April 2000, Raleigh County was assigned a second Family Law Master which resulted in all even numbered cases being assigned to the new Law Master H. Suzanne McGraw.

the May 2005 appeal and the Appellant's response thereto, the Circuit Court ruled on July 27, 2005, that the statute of limitations did not bar the Appellee's attempt to collect the overpayment.

After the entry of the July 27, 2005, Order, the Appellant elected not to appeal Judge Burnside's ruling of July 27, 2005. There being no appeal of the July 27, 2005, Order, the matter was remanded back to the Family Court for the purpose of determining the amount of overpayment that the Appellee was entitled to recover. The only proceedings conducted after the entry of the July 27, 2005, Order were the proceedings to establish the amount of the overpayment made by the Appellee.

II. POINTS AND AUTHORITIES RELIED UPON

WEST VIRGINIA STATUTES:

WEST VIRGINIA CODE § 48-11-107.....6

WEST VIRGINIA CASES:

SER Frazier & Oxley v. Cummings,

214 W. Va. 802, 591 S.E.2d 728 (2003).....4

III. DISCUSSION OF THE LAW

This matter is before the Court, pursuant to the Appellant's Petition appealing the Circuit Court of Raleigh County's Order of May 22, 2006. Specifically, the Appellant has presented one (1) assignment of error, whether the Appellee's right to collect his overpayment is barred by the

statute of limitations. This assignment of error is not timely filed and should not be considered by this Court because it pertains to an issue that was not part of the Court's ruling of May 22, 2006, and was not timely filed as an appeal of the Order of July 27, 2005.

The first step in evaluating the Petition should be to focus on the content of the May 22, 2006, Order, and those issues which are subject to appeal. The Order which is part of the Court file contains three specific rulings. The first ruling affirmed the Family Court's order denying an award of attorney fees to the Appellee. The second ruling remanded the matter to the Family Court for the purpose of calculating interest on the overpayment. The third ruling affirmed the collection of the overpayment from the Appellant. See Order entered May 22, 2006.

The order of May 22, 2006, also clearly states:

"For the reasons more fully explained in the court's memorandum of May 22, 2006, the court respectfully **declines to consider the issue of the statute of limitations** as presently framed, **that issue having been decided in an appeal previously considered** in this action. See paragraph five of the Order of May 22, 2006. (Emphasis added)

Although the Circuit Court referred to the issue of the statute of limitations, the Circuit Court did not revisit the issue of the application of the statute of limitations or make any rulings on the issue as part of its May 22, 2006, Order. The Circuit Court correctly determined that the issue of the statute of limitations had been before the Court previously, but was not properly before the Court at that time.

The Circuit Court properly refused to consider the Appellant's attempt to revive the statute of limitations based upon *SER Frazier & Oxley v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003) as cited by Judge Burnside in his Memorandum of May 22, 2006. Judge Burnside fully applied the applicable law in his decision to not reconsideration the July 27, 2005,

ruling on the issue of the statute of limitations. Judge Burnside correctly determined that the prior ruling of July 27, 2005, did not remand the issue of the statute of limitations and that the proper time for the Appellant to appeal the ruling on the statute of limitation's application had long passed.

Should the Court decide to review this matter further, the Court should note that the Petition and Brief filed by the Appellant in this appeal, merely raise the same legal arguments as those presented prior to the July 27, 2005, Order and the Appellant has cited no change in the law to allow a subsequent attack on that Order, since no appeal of the July 27, 2005, Order was ever filed.

After receiving and considering the same arguments that are before the Court at this time, in the May 2005 appeal, the Circuit Court properly ruled on July 27, 2005, that the statute of limitations did not bar the Appellee's attempt to collect the overpayment. It was the Appellant's obligation to appeal that ruling at that time, and not as a collateral attack at this time.

In the event the Court elects to consider the matter of the statute of limitations, it is the Appellee's position that if the audit performed in April 2000 in response to Judge Staton's ruling was sufficient to be considered a final ruling, such that the Appellee should have known he could collect the overpayment, then that ruling is tantamount to a decretal judgment and is subject to a ten (10) year statute of limitation for collection purposes. If, on the other hand, the audit produced in response to the Order did not grant a judgment, then the matter was not final and no statute of limitation can be applied until such time as all matters have been ruled upon by the Court.

In reviewing the current status of the law on this matter, it seems that the Legislature

recognized that there was an inadequacy in the law prior to 2001. Since the proceedings in this case were conducted to resolve the claimed overpayment, the Legislature has directly addressed the issue of overpayments. In *West Virginia Code* §48-11-107, the Legislature has provided the following relief to overpaying obligors in order to avoid problems similar to those which arose in this case. Specifically, the Legislature has provided as follows:

“The Court shall inquire as to whether a support arrearage was owed by the obligor for support due prior to the filing of the petition for modification. If an arrearage exists, the court shall order an offset of the overpayment against the child support arrearages. If no prior arrearage exists or if the arrearage is not sufficient to offset the overpayment, then the court may direct the bureau for child support enforcement to collect the overpayment through income withholding, if the person has, in the court’s opinion, sufficient income other than the child support received...” *West Virginia Code* §48-11-107 (2001).

West Virginia Code §48-11-107 further states:

“... where a petition to modify child support is granted which results in a reduction of child support owed so that the obligor has overpaid child support, the court **shall** grant a decretal judgment to the obligor for the amount of the overpayment.” *Id.* (Emphasis added).

It is clear that the legislature has determined that an overpaying obligor should be afforded the same rights as the obligee, that is, an overpaying obligor shall be awarded a decretal judgment for any determined overpayment, to allow the obligor the right to cover the overpayment.

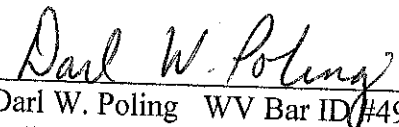
In the present case, the Appellee merely sought the exact relief which the Legislature has codified. In his review of this matter, Judge Burnside determined that the Appellee had followed the proper procedures in trying to legally collect his overpayment. Therefore, the Appellee requests that the Court affirm the Circuit Court’s decision.

IV. CONCLUSION

Although the Appellant wants this Court to focus on everything that has happened in this case and ignore the content of the Order from which the appeal arises, it is clear, that the only issue presented by the Appellant for consideration is not timely before the Court and should be rejected.

It is undisputed that the last Order entered in this case by the Circuit Court did not make any rulings on the issue of the statute of limitations, and to the contrary, clearly, rejected that issue as being before the Court. Therefore, the Appellee respectfully requests that the Court reject the Appellant's Petition and affirm the Circuit Court's ruling.

JAMES T. FOSTER
By Counsel


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MEMO

TO: Heidi Talmage
D. Clinton Gallaher, IV
Darl W. Poling

FROM: LOUISE G. STATON *lep*
Family Law Master

RE: *State ex rel. Lilly v. Foster*
Civil Action 81-D-390-A

DATE: May 28, 1998

After careful review of the evidence presented at the various hearings held herein as well as the memoranda submitted on the issue of the statute of limitations, I will make the following recommendation to the Circuit Court of Raleigh County, West Virginia:

I will recommend that the statute of limitations bars any collection of child support which accrued prior to April 22, 1987. This based upon the failure of the Plaintiff to seek to execute on the judgment at any time prior to April 22, 1987, which is the date she sought a determination of the amount of arrearages. The requirements for preserving judgments is set forth in *W. Va. Code* §§48A-5-2, 38-3-18 and 38-3-19. The Bureau of Child Support Enforcement's (BCSE's) argument that notices to employers requiring income withholding is simply not supported by the law. Counsel for Defendant quite accurately sets forth the procedures for preserving child support judgments and the case law relevant thereto. Those requirements have not be met in this case and are not satisfied by the filing of income withholdings.

Additionally, the BCSE's arguments that payments made within the last ten years be credit towards child support accrued prior to April 22, 1987 is not supported by any case or statute.

The BCSE is directed to complete a new audit which reflects this recommendation and Mr. Poling is directed to prepare an Order which reflects this recommendation and directs the audit. If further hearing is required after receipt of the audit, counsel should notify the Family Law Master within ten days of receipt of same. Unless otherwise notified, I will recommend the amount of the new audit as the amount of the decretal judgment.

Counsel for BCSE shall immediately notify me as to the amount of money being held pursuant to this Court's Order entered February 28, 1998.

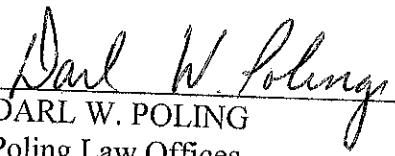
Exhibit "A"

CERTIFICATE OF SERVICE

I, Darl W. Poling, counsel for the Defendant/Petitioner, do hereby certify that a true copy of the foregoing **APPELLEE JAMES T. FOSTER'S BRIEF IN OPPOSITION TO PETITION FOR APPEAL** has been served upon counsel for the Appellant and the following individuals, by mailing a true and exact copy thereof, by United States mail, postage paid on this the 29th day of March, 2007, to following addresses:

David S. Hart, Esq.
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Beckley, WV 25801

Heidi Talmadge, Esquire
Bureau for Child Support Enforcement
350 Capitol Street, Room 347
Charleston, WV 25301


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